

NO. 22118-A

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ANGELUS FUNERAL HOME,

Petitioner,

vs.

COMMISSIONER OF INTERNAL  
REVENUE,

Respondent.

ON PETITION TO REVIEW A DECISION  
OF THE  
TAX COURT OF THE UNITED STATES

PETITION FOR REHEARING  
BY  
TAXPAYER-PETITIONER

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Taxpayer-Petitioner Angelus Funeral Home hereby respectfully petitions this Court for a rehearing to reconsider the judgment entered herein on February 10, 1969; rehearing and reconsideration is requested upon all of the grounds and considerations set forth below:

(1) In its decision this Court has ruled that conceding that the post-1961 pre-need funeral agreement form employed by Angelus created an enforceable trust, the power therein expressed permitting Angelus during the period of deposit to use the trust moneys for mortuary capital improvements or to acquire real property gave Angelus as trustee so substantial an "economic



benefit . . . that Angelus should be taxable on receipt of the payments notwithstanding . . . power [in] the beneficiaries . . . to enforce the trust terms under state law." (Slip Op. , p. 4.) Because of this, the Court found "applicable" the rule of "the capital improvement trust cases" (Slip Op. , p. 5) represented by the Mount Vernon, Gracelawn, Jefferson, Sherwood and National Memorial Park decisions, <sup>1/</sup> holding permanent funeral-plan trust funds dedicated in fee to mortuary capital improvements---as distinguished from similarly permanently-deposited funds dedicated permanently to individual lot maintenance and care for the lots of the individual depositors---constitute taxable income to the funeral-home-trustee at the time of receipt.

But a crucial circumstance distinguishes all of said cited cases from the case at bar; the cited cases---without exception---are trusts dedicating deposited funds to generalized mortuary "capital improvements" in fee. At bar, Angelus' trust limitation is not merely that it may use the deposited funds only for capital improvements or the acquisition of real property (either of which as to permanent deposit funds would be insufficient to avoid taxability under the said cited cases) but the vital further limitation

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<sup>1/</sup> Mount Vernon Gardens, Inc. v. Commissioner (C.A. 6, 1962) 298 F.2d 712; Gracelawn Memorial Park, Inc. v. United States (C.A. 3, 1958) 260 F.2d 328; Jefferson Memorial Gardens, Inc. v. Commissioner (C.A. 5, 1968) 390 F.2d 161; Sherwood Memorial Gardens, Inc. v. Commissioner (C.A. 7, 1965) 350 F.2d 225 and National Memorial Park v. Commissioner (C.A. 4, 1944) 145 F.2d 1008, all cited in Slip Op. , pp. 4-5.



that it may not use the deposited funds for those or any other purposes in fee, but may use the funds for the provided purposes only during a temporary limited period of deposit and subject to---as this Court has conceded---an enforceable trust duty to restore the funds to the designee of the applicant on the applicant's death should death occur outside of Los Angeles County and in a place where funeral services by Angelus should be "[im]practicable." (Petr. Ex. 11, par. 7.)

This is a controlling distinction. All that Angelus at most may lawfully appropriate to capital improvement purposes under the post-1961 deposit agreements is the interim, temporary use-value of the trust moneys paid in by any individual applicant for as long as his trust agreement remains operative and until the same is terminated either by refund or by performance by Angelus at the time of the applicant's death. The funeral-home-trustees in the Mount Vernon and companion cited cases possessed express power to devote the trust moneys concerned in each of those cases to capital improvements in fee, and it was this broadly selfish power which those decisions held created taxability at the time of receipt to the funeral-home-trustee. At bar Angelus receives no moneys under the deposit agreements permanently or in fee, and the limited term of holding existed as a matter of enforceable state trust law, as this Court concedes. This means that California law would require safeguards in this as well as all other trust respects limiting Angelus to conduct in "uberrima fides". Further, it has been stipulated at bar that Angelus in





fact held funds on deposit in appropriate trust bank accounts not only adequate to fully insure performance of any demands for refunds which might arise but in fact equal to or exceeding the total amount of deposits under all of the post-1961 agreement deposit forms. (Joint Tax Court Exhibit 9-I, Schedule I.)

(2) Thus it is the circumstance that the trust moneys at bar must be held as an interim trust deposit---pending resolution of the trust by either refund or funeral-service performance by Angelus at the time of an applicant's death---which marks the difference between the instant case and the cited Mount Vernon decision and companion cited cases. Moreover, this Court has simultaneously declared at bar---and indeed it is the law of the case since the Commissioner on this score did not appeal---that the total appropriation to Angelus' own purposes and ends of the use-value of the trust moneys under the pre-1961 agreement forms, through Angelus' appropriation of the interest earned on the bank deposits of such funds, was not destructive of the nontaxability of the trust funds in Angelus' hand since such could be considered as no more in value than fair compensation to Angelus as trustee for administrative burdens. In sustaining Angelus' right to take the interest earned on the trust funds as the equal of trustee fees, the Court approves as to the pre-1961 deposit arrangements a total appropriation by Angelus of the interim use-value of the deposited trust moneys, because that is what "interest" is---compensation





for the temporary power or right to use money during a defined time-period.

If it was permissible, and did not alter the tax-immune status of Angelus as the trustee in the pre-1961 tax years for Angelus to appropriate totally the money interest earned upon the trust deposits, then it should not destroy such immunity as to the post-1961 tax years that Angelus has appropriated, or possessed power to appropriate, in a limited way (to invest only in prescribed ways) the same use-value of the same trust deposits during the same temporary interim period of trust holding.

(3) Moreover, for the temporary, limited "use-value" power granted to it under the post-1961 deposit forms, Angelus itself concededly pays the depositors an affirmative form of interest. As compensation for the interim power to invest in capital improvements or real property, and to induce depositors under the earlier forms to transfer to post-1961 deposit forms, Angelus under the post-1961 agreement forms pays each year to each depositor ten percent of the amount paid in by such depositor during such year. (Slip Op. , p. 3. )

It was precisely this feature of the payment of interest by the deposit-holder in the Clinton Hotel case (Clinton Hotel Realty Corp. v. Commissioner (C.A. 5, 1942) 128 F.2d 968) which caused the Court to find that moneys advanced there as a deposit under a lease were distinguishable from moneys received under a plenary-use power and were sufficiently characterized as



security or deposit funds to make them nontaxable to the recipient at the time of receipt.

In disallowing the force of the Clinton Hotel decision and of Consolidated-Hammer Dry Plate & Film Co. v. Commissioner (C.A. 7, 1963) 317 F.2d 829, this Court points to Van Wagoner v. United States (C.A. 5, 1966) 368 F.2d 95, and Astor Holding Co. v. Commissioner (C.A. 5, 1943) 135 F.2d 47 as "more closely analogous to" the instant case. (Slip Op. , p. 6.) Both the Van Wagoner and the Astor Holding Co. decisions expressly note that in their respective premises, unlike the facts in Clinton, the power-holder "did not pay interest" on the challenged deposit-funds. (368 F.2d 95, 97, emphasis added; 135 F.2d 47, 48.)

(4) As this Court said (Slip Op. , p. 6) of the advance sales deposit payment in the Consolidated Hammer case, supra, the feature at bar which requires, by an enforceable trust duty, that Angelus hold the post-1961 contract deposits in trust as interim trust holdings, subject to a trust duty to refund the same at any time in any individual case upon the death of the depositor should death occur outside of Los Angeles County where funeral services by Angelus would be "impracticable" or should the next of kin request a transfer to another funeral company, or should the depositor before death request transfer or refund <sup>2/</sup>, gives the

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<sup>2/</sup> As noted in Petitioner's Opening Brief, p. 28. f.n. 6, the contingency of a duty of refund was a substantial one; the  
(Continued)



deposited moneys "the attributes of a financing arrangement in the nature of a loan." (Slip Op. , p. 6, emphasis added; the language is taken by this Court from the Consolidated-Hammer decision, 317 F.2d 829 at p. 832.)

It is this duty---contingent but real <sup>3/</sup> ---to restore the trust moneys to the applicant or to the designee of his next of kin should refund be requested or required which makes the instant case truly analogous not to the Mount Vernon decision and like cases but to the rental-deposit, sales-advance-deposit, and option-deposit lines of decisions cited and developed in detail in petitioner's briefs.

A loan is concededly not income for taxation purposes, however free the borrower may be to employ the funds in the interim as he will. So, too, according to the lease, sale and option deposit cases cited by petitioner a "deposit" subject to a

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<sup>2/</sup> (Continued)

chance that the depositor might move from Los Angeles and die outside of the Los Angeles area and where funeral services by Angelus would be impracticable was a considerable contingency and one over which petitioner had no control; the contingency that the depositor might request a withdrawal prior to his death or that the next of kin after death might request a transfer of the funds to another funeral director arose not from the direct terms of the deposit forms but from petitioner's uniform and unvarying conduct and practice according to the uncontested testimony. (Rep. Tr. pp. 23-26; POB, p. 9, f.n. 4.) Consistent and unvarying conduct by the petitioner limiting its rights and powers as trustee would be, as noted in the briefs, particularly controlling under trust law since the trust document would in any event be construed most strictly against Angelus as the initiator and draftsman thereof. (Id.)

<sup>3/</sup> See the comments in the footnote immediately above.





substantial, enforceable duty to account for and return the deposited funds after a holding period should a declared contingency take place, is equally not income in tax terms; and particularly is this the case where, as in the instant case, the interim holding, and the duty to hold for safe return, is made an express trust duty, not merely a contract duty, and where the power of the trustee to use or invest the funds during the holding interim is, as in the instant case, curtailed by substantial limitations safeguarding the content and value of the trust res and the ready capacity of the depositor to refund the same or any required part promptly should the contingency requiring refund occur.

(5) This Court's decision in the Mutual Telephone case (Mutual Telephone Co. v. United States (C.A. 9, 1953) 204 F.2d 160) directly illustrates the principle concerned at bar. There the taxpayer telephone company for a period of years held certain funds collected from subscribers subject to an order by the Hawaiian Public Utility Commission requiring that the funds be held as "Contributions to Telephone Plant" and not be finally disposed of in any other manner until further order. After a number of years of such holding, the Commission finally authorized the taxpayer to deposit the funds permanently in its employees' "Retirement System" fund---but the taxpayer was never given plenary freedom to use the funds as it might choose as in the case of true, ordinary income. This Court recognized the





distinction between the interim holding (though that holding was for a semi-selfish purpose, plant contribution) and the ultimate permanent holding of the taxpayer when it was permitted to deposit the funds into its employees' pension fund (still a limited purpose, but a selfish and now permanent purpose). This Court held the deposited moneys were not taxable income to the telephone company during the interim holding, but were taxable income to the company when it was finally permitted to deposit the same permanently in its employees' pension fund.

(6) The Court disallows (Slip Op. , p. 7) the sales-of-goods cases cited by petitioner (Veenstra & De Haan Coal Co. (1948) 11 T.C. 964 and Woodlawn Park Cemetery Co. v. Commissioner (1951) 16 T.C. 1067) by inferring that Angelus was obligated under the post-1961 deposits only to furnish funeral services and not to furnish and sell a casket; the Court infers this limitation from an interpretation only of the word "use" in the post-1961 deposit forms. (Petr's Ex. 11.) But this overemphasizes the single word isolated thus by the Court and ignores the uncontradicted record testimony of the practice of the parties to all such agreements in all cases to include the sale and furnishing of a casket with the furnishing of funeral services, and as a part thereof, the casket to be valued at one-half of the total sum payable to Angelus in the absence of more specific instructions or choices by the applicant or the next of kin. (Rep. Tr. , pp. 25-27.) Thus the sale-of-goods cases are applicable at bar, and the consideration



stressed in those decisions that deposits in advance of sales of goods do not lend themselves to classification as advance "income" to the vendor where, as is true at bar, the cost basis to the vendor for the goods ultimately delivered and sold under the agreement is not computable or determinable at the time of the advance deposit, is fully relevant to, and has cogent force, at bar.

(7) The circumstances discussed under (5) above distinguish also the Schlude and companion Supreme Court cases,<sup>4/</sup> cited by the Court at page 7 of the Slip Opinion.

Those cases were not sales-of-goods cases in any part; they involved solely advance payments for future services. Moreover, the payments were expressly made irrevocable in those cases and were subject to no even contingent duty requiring return of the payments should the payor elect to request or require refund or should any expressed contingency occur. The amount and extent of services which the payee might have to furnish were subject to the future choice or needs of the payor, but the certainty of the payment as income was never in jeopardy or subject to any expressed contingency. The contract, in short, was final at the time of payment, and the money paid was received absolutely, under a present, total claim of right by the payee.

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<sup>4/</sup> Schlude v. Commissioner (1963) 372 U.S. 128; American Automobile Association v. United States (1961) 367 U.S. 687; and Automobile Club of Michigan v. Commissioner (1957) 353 U.S. 180.



None of these factors exist at bar. Hence the Schlude and companion decisions cannot properly control here.

### CONCLUSION

WHEREFORE, upon all of the grounds and for all of the reasons and considerations above stated taxpayer-petitioner, Angelus Funeral Homes, moves the Court for a rehearing herein and a reconsideration of the judgment heretofore rendered.

Respectfully submitted,

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